IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1282

ANGELO GIANONE,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

Opposition to Petition for Writ of Certiorari to the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles.

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Respondent prays that a Writ of Certiorari to the judgment and decision of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, entered in the above entitled case on February 15, 1972, and March 6, 1972, be denied.

JURISDICTION.

Respondent respectfully objects to the jurisdiction of this Honorable Court to grant a writ of certiorari in the instant case for the following reasons:

Petitioner relies upon 28 U.S.C., Section 1257 (3), the applicable provisions of which read as follows:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

> "(3) By writ of certiorari where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution . . . or where any . . ., right, privilege or immunity is specially set up or claimed under the Constitution . . . of the United States."

Petitioner then alleges that the "Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles is the highest State Court to which a misdemeanor appeal can be taken", citing as his authority, "California Constitution, Article IV, Section 1."

In this assertion, Petitioner is in error. Article IV, Section 1, of the California Constitution, deals exclusively with the Legislative Department. Article VI deals with the Judicial System. Section 11, of Article VI, deals with the Appellate Jurisdiction of California Courts:

> "The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction when superior courts have original jurisdiction *and in other causes prescribed by statute*." (Emphasis ours).
>
> "Superior courts have appellate jurisdiction *in causes prescribed by statute* that arise in municipal and justice courts in their counties." (Emphasis ours).

Thus it is apparent from this section of the California Constitution that we must look to a statute in order to determine the highest state court in the matter of appellate jurisdiction. We find that information in Sec-

tion 1471, of the Penal Code of the State of California, which reads in pertinent part as follows:

> "A court of appeal *may order any case on appeal within the original jurisdiction of the municipal and justice courts in its district transferred to it for hearing and decision* as provided by the rules of the Judicial Council when the superior court certifies *or the district court of appeal determines,* that such transfer appears necessary to secure uniformity of decision or to settle important questions of law." (Emphasis ours).

For complete section 1471 P.C., please see Respondent's Appendix A.

This statute became operative on January 2, 1962. It follows then, as a matter of both fact and law, that the District Court of Appeal is the highest State Court to which a misdemeanor appeal may be taken, not the Appellate Department of the Superior Court.

Petitioner has not sought an order of transfer from the District Court of Appeal. Until he does and it has been denied, or if granted the case resolved against him, he has not exhausted his remedies in the "highest court of the state in which a decision could be had", as required by 28 U.S.C., Section 1257-(3).

I.

Statement of the Case.

Petitioner is, and was at the time of the issuance of the complaint here involved, the owner and active manager of a combination bar-restaurant which bears his name. For a number of years he has advertised and provided "Topless and bottomless" entertainment for his customers, charging admission in addition to the price

of food and drink. This establishment is located in Pasadena, Calif.

The offense for which he was tried and convicted is a violation of Section 311.6, of the California Penal Code, which reads as follows:

> "Every person who knowingly engages or participates in, manages, produces, sponsors, presents or exhibits obscene live conduct to or before an assembly or audience consisting of at least one person or spectator in any public place or in a place exposed to public view, or in a place open to the public or to a segment thereof, whether or not an admission fee is charged, or whether or not attendance is conditioned upon the presentation of a membership card or other token, is guilty of a misdemeanor."

This statute was adopted in its present form in 1970, by way of an amendment to the former statute of the same number.

At the same time the California Legislature amended Section 311, of the Penal Code, defining "Obscene live conduct" in Subsection (g), included herein as Respondent's Appendix B; and "knowingly" in Subsection (e), as follows:

> "Knowingly means being aware of the character of the matter or live conduct."

As stated by Petitioner in his Petition in the fourth paragraph on page 8, he had "hired a dancer, Makedonka Spase Rollins, from the Dell Ray Agency", and it was she who was performing the obscene live conduct under Petitioner's sponsorship, management, production, presentation, and exhibition, to and before an audience as prohibited by Section 311.6.

Miss Rollins was, therefore, the employee of Petitioner at the time of this performance.

II.

The Performance of Miss Rollins Was Obscene Live Conduct.

Petitioner has summarized the testimony of Pasadena Police Sergeant Larry Harnois. More specifically, Sergeant Harnois testified as follows:

> "She kept time with the music provided by the jukebox, girated her hips around to this gentleman, and I walked by him just as she was girating her pubic area in his face and her knees were to each side of his head, and I could clearly see the vulva and her anus.
>
> "She stood up at about the same time that I sat down, which was right next to this gentleman, on his right side—stood up and put her heels on the serving area of the bar, separated her legs approximately 24-26 inches wide at the ankles, leaned completely over from her waist forward and exposed her vulva and her anus to this customer and also to myself—put her buttocks in the area of this gentleman's face." [RT p. 50, beginning with line 15].

As stated by Petitioner in his Petition, the lady repeated this "obscene live conduct" on at least four occasions with as many customers, in summarizing Sergeant Harnois' testimony.

III.

Petitioner Knowingly Managed, Produced, Sponsored, Presented, and Exhibited the Performance Which Was Obscene Live Conduct.

Sergeant Hornois' testimony continues:

"As she was exposing herself to this gentleman, I was watching him (Petitioner), the customer and her, and I noticed Mr. Gianone looking toward the stage for a few moments." [RT p. 56, line 18].

". . . again looked, but glance was rapid." [RT p. 56, line 23].

"At the time of the arrest, Gianone said, 'Well, I just came in, Larry', and I advised him that was not true because I had seen him when I entered the bar." [RT p. 58, line 5].

Petitioner's own testimony:

"When I came in I came in through the door, and I stopped right here because this is about 42 inches back of the booth, and Leo and I stood here watching the girl dance . . ." [RT p. 166].

"Then, we watched the performer dance because she was a new dancer, and I was curious to see her how she performed." [RT 167, line 25].

"I did see her dance when I was with Dr. Fineman; because I turned my head and glanced a few times." [RT p. 183].

He also testified that he is the manager of Gianone's Steak House and in charge of the establishment [RT p. 194].

IV.

An Expert Witness Was Called, Qualified, and Testifed as to the Obscenity of the Live Conduct, to Wit: Its Predominant Appeal to Prurient Interest: That It Exceeded Accepted Statewide Standards: and Lacked Redeeming Social Importance.

"In judging whether a performance is obscene, the trial judge may permit expert testimony to assist in the determination of contemporary standards as well as the artistic merit and social importance of the performance."

Landau v. Fording, (1966) 245 Cal. App. 2d 820, 51 Cal. Rptr. 177. (Affirmed, 388 U.S. 456, 87 S. Ct. 2109).

V.

The Jury Found Petitioner Guilty.

The questions of law were resolved against Petitioner by the trial judge, and the questions of fact were resolved against him by the jury. After hearing all of the evidence, the jury found Petitioner guilty as charged.

The Appellate Department of the Superior Court affirmed on appeal; denied rehearing and certification to the District Court of Appeal. No petition for an order transferring the case was filed with the District Court of Appeal under the provisions of Section 1471 of the California Penal Code.

In the opinion of Respondent, the case is now before this Honorable Court prematurely due to Petitioner's failure to seek a review by the District Court of Appeal. The procedure provided for in Section 1471 constitutes an appeal from the decision of the Appellate Department of the Superior Court, thus making the District Court the "highest state court in which a decision could be had".

ARGUMENT.

I.

The Performance Was Not Constitutionally Protected.

There was expert testimony that the alleged dancer's actions were obscene.

Please see the testimony of Sergeant Jack Greenlees, of the Los Angeles County Sheriff's Office, beginning with RT page 90, through page 99; and note his qualifications as an Expert Witness on both "Obscenity" and "State-wide community standards."

> "The performance of a dance for an audience, like other forms of expression or communication, prima facie enjoys protection under the First Amendment of the U.S. Constitution, but it loses such protection on a showing of obscenity; and to show obscenity, the prosecutor must introduce evidence that, applying contemporary community standards, the questioned dance appealed to the prurient interest of the audience and affronted the standards of decency accepted in the community."
>
> *In re Giannini*, (1968) 69 Cal. 2d 563, 446 P. 2d 535 (Certiorari denied, 395 U.S. 910, 89 S. Ct. 1743).

Petitioner indicates in his questions on page 3 and 4 of his Petition that the performance here involved was a "dance".

Respondent does not agree with that interpretation. It is true that the acts were performed on a stage in a bar in front of patrons who had paid an admission

fee. But here the similarity to a bona fide dance ends. Her entire performance was nothing more than an exhibition calculated to arouse the latent sexual desires and release the inhibitions of the viewers rather than a "mode of expressing emotion and dramatic feeling" by the performer.

In our opinion the conduct of the performer is not embodied in the concepts of freedom of speech or communication of ideas envisioned by the framers of the Constitution, nor can it, by being dignified as either a dance or a theatrical performance, be extended the protection afforded by the First Amendment under a doctrine of liberal construction.

It was activity intended to be condemned by the Legislature in enacting Section 311.6, of the California Penal Code.

The First Amendment of the United States Constitution does not protect obscenity.

> *Roth v. United States*, 354 U.S. 476, 485, 1 L. Ed. 2d 1498, 1507.

It merely guarantees that certain standards shall be met if obscenity is to be found.

> *Memoirs v. Massachusetts*, 383 U.S. 413, 418-419, 16 L. Ed. 2d 1, 5-6.

We respectfully submit that those standards have been met in the instant case.

II.

Petitioner Knowingly Managed, Produced, Sponsored, Presented, and/or Exhibited the Obscene Live Conduct Involved Herein.

As previously stated, the California State Legislature defined "knowingly" to mean, "being aware of the character of the matter or live conduct".

The testimony of Sergeant Harnois, as well as Petitioner's own testimony, clearly shows that he was "aware of the live conduct" of his new "dancer", having observed it as she performed.

"Knowingly" as defined by the Legislature, does not mean knowledge that it was legally obscene. That is a point which it is often difficult for judges and juries to resolve. But that is exactly what they did in the case before us now.

> "Knowingly, as used in subsection (e) of Section 311, means merely that the defendant must have known the contents of the material, and must have been aware in some manner of its character."
>
> *People v. Campise,* (1966) 242 Cal. App. 2d 905, 51 Cal. Rptr. 815.

Clearly, from its date, this opinion of the California District Court of Appeal predated the addition of "obscene live conduct" to the prohibition of Section 311.6 and the inclusion of "live conduct" in the Legislative definition of "knowingly".

It would appear, however, that a reasonable extension of the opinion to the addition would be: That the defendant (Petitioner) must have been in some manner aware of the character of the live conduct.

The jury was satisfied, beyond a reasonable doubt, that the prosecution established this element.

III.

Neither Petitioner nor His Employee Were Clothed With Judicial Immunity Under the Holdings in Barrows v. Municipal Court or In re Giannini.

In the *Barrows* decision, the California Supreme Court clarified and modified *In re Giannini,* heretofore cited and discussed.

Among other things not particularly relevant to the instant case, the *Barrows* decision held that Section 647(a) of the California Penal Code could not be used as a charging section in cases involving theatrical performances, which *Giannini* had extended to performances in establishments somewhat similar to that of Petitioner.

At page 830 of *Barrows* the Court stated:

> "acts which are unlawful in a different context, circumstance, or place, may be depicted or incorporated in a stage or screen presentation and come within the protection of the First Amendment, *losing that protection only if found to be obscene.*" (Emphasis ours).

And at page 831:

> "We need not point out that the Legislature may prohibit the performance of an obscene play provided that constitutional standards are met in defining obscenity."

That is exactly what the California Legislature did in subsequently amending Sections 311, and 311.6, of the Penal Code.

Also on page 830, of *Barrows*, the Court made the following statement:

> "Our holding here does not suggest that acts which are independently prohibited by law may be consummated without sanction on the stage merely because they occur during the course of a theatrical play."

This exception left Section 314 of the California Penal Code operable in cases such as the instant one, until the Legislature adopted Section 311.6 in its present form, thus replacing Section 314 with a statute specifically directed at the type of conduct under consideration here.

Barrows v. Municipal Court, 1 Cal. 3d 821, 464 P. 2d 483.

Conclusion.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

BYRON B. GENTRY,
Pasadena City Prosecutor,
Attorney for Respondent.

APPENDIX A.

Penal Code Section 1471.

"Transfer of Municipal and Justice Court Appeals" "Sec. 1471. Transfer of municipal and justice court appeals: Certification or determination of transfer: Power of reviewing court."

"A court of appeal may order any case on appeal within the original jurisdiction of the municipal and justice courts in its district transferred to it for hearing and decision as provided by rules of the Judicial Council when the superior court certifies or the district court of appeal determines, that such transfer appears necessary to secure uniformity of decision or to settle important questions of law.

"No case in which there is a right on appeal to a trial anew in the superior court shall be transferred pursuant to this section before a decision in such case becomes final therein.

"A court to which any such case is transferred shall have similar power to review any matter and make orders and judgments as the superior court by statute would have in such case, except as otherwise expressly provided and except that if the case was tried anew in the superior court, the reviewing court shall have similar power to review any matter and make orders and judgments as it has by statute in a case within the original jurisdiction of the superior court."

APPENDIX B.

Penal Code Section 311.

"Sec. 311. Definitions. As used in this Chapter:

"(g) "Obscene live conduct" means any physical human body activity, whether performed or engaged in alone or with other persons, including but not limited to singing, speaking, dancing, acting, simulating, or pantomiming, where, taken as a whole, the predominant appeal of such conduct to the average person, applying contemporary standards is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is conduct which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is conduct which taken as a whole is utterly without redeeming social importance.

"(1) The predominant appeal to prurient interest of the conduct is judged with reference to average adults unless it appears from the nature of the conduct or the circumstances of its production, presentation or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the conduct shall be judged with reference to its intended recipient group.

"(2) In prosecutions under this chapter, where circumstances of production, presentation advertising, or exhibition indicate that live conduct is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the conduct and can justify the conclusion that the conduct is utterly without redeeming social importance."